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Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No.

In The Supreme Court of the United States

October Term, 1984

STATE OF NEW YORK,

Petitioner,

vs.

ALFIO FERRO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the placement of the furs in front of the respondent's cell was the functional equivalent of illegal questioning thereby violating the Constitution.

2. Whether a fresh set of Miranda Warnings must be given when questioning resumes assuming, arguendo, that all questioning must not permanently cease once the respondent has exercised his right to counsel.

TABLE OF CONTENTS

Page

Questions Presented..... i

Statement of Facts..... 1

POINT ONE-Respondent's Constitutional right secured by the Fifth Amendment was violated by the use of a statement made by him to law enforcement officers..... 3

POINT TWO-A fresh set of Miranda Warnings must be given when questioning resumes assuming, arguendo, that all questioning must not permanently cease once the respondent has exercised his right to counsel..... 6

TABLE OF AUTHORITIES

Cases

Leyra v. Denno, 347 U.S. 556 (1954)..... 5

Michigan v. Mosley, 423 U.S. 96 (1979)..... 3

Miranda v. Arizona, 384 U.S. 436 (1966)..... 3

People v. Bodner, 74 A.D. 2d 440..... 4

People v. Faison, 78 Ill. App 3d 911 (1979)..... 4

People v. Punch, 70 A.D. 2d 664 (2d Dept., 1979)..... 3

People v. Bryant, 59 NY 2d 786..... 7

State v. Emory, 131 Ariz 493..... 5

State v. Godfrey, 131 Super 168..... 5

Rhode Island v. Innis, 446 U.S. 291 (1980)..... 7

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF NEW YORK

Petitioner,

-against-

ALFIO FERRO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement of Facts

Lillian Sher was murdered on December 5, 1975 in the course of a robbery. One week later respondent was arrested for causing the death. Respondent had no obvious connection to Sher and there was no direct evidence linking respondent to the crime. Respondent was taken to the 106th Precinct in Queens County and was read his Miranda Warnings. Respondent refused to speak to Detective Robert Hudson, who was assigned to the Sher investigation. Later in the day, respondent stated he wanted to speak to the District Attorney. The detective asked why and respondent resumed his silence. Detective Hudson left the 106th Precinct and returned with a handful of furs he had recovered. The furs were placed a foot from the cell where they remained for some period of time. Respondent then asked if there was a District Attorney who could do something for him. Approximately fifteen minutes later, after being told that neither he nor the

District Attorney could do anything for him, he asked to speak with a "Pisano". Detective Walter Cassi was brought before respondent; "I am Italian, do you want to say something." Respondent continued with a discusssion he had with Sher's neighbor, Florence Freeman, saying she wanted her robbed. Respondent said he was not interested and Freeman asked if he could get somebody. According to respondent, he said he would think about it. Subsequently, these statements were used against him at trial.

A motion to supress the statement made after respondent's viewing of the furs was denied and respondent was convicted of Murder in the Second Degree and was sentenced to a term of imprisonment of 15 years to life.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, by respondent, the lower Court's decision was affirmed, with opinion, by a 3 to 2 decision. Respondent subsequently appealed to the Court of Appeals of the State of New York and the Appellate Division, Second Judicial Department was reversed by a 5 to 1 decision and the motion to supress granted.

POINT ONE

RESPONDENT'S CONSTITUTIONAL RIGHT SECURED BY THE FIFTH AMENDMENT WAS VIOLATED BY THE USE OF A STATEMENT MADE BY HIM TO LAW ENFORCEMENT OFFICERS.

Respondent had been given his Miranda Warnings by Detective Hudson and respondent chose and elected to exercise his constitutional privilege to remain silent. The furs were intentially put in front of his cell admittedly to intimidate and provoke respondent into making a statement. A frightened and coerced respondent then, and only then, asked to talk to an Italian Detective. He was brought before the Detective hours after being given his original Miranda Warnings and then was interrogated without being given new warnings. "Admissibly all statements obtained after the person in custody has decided to remain silent depends, under Miranda, whether his right to cut off questioning was scrupulously honored." *Michigan v. Mosely,* 423 U.S. 96 (1979). In the case at bar, it can hardly be said that the request of respondent was scrupulously honored, instead, psychological ploys were illegally used to improperly induce the defendant's statement. Detective Hudson did not adhere to respondent's request, but used pressure and psychlogical coercion to get him to waive his Fifth Amendment right to counsel which he already had indicated. *People v. Puch,* 70 A.D. 2d 644 (2nd Dept., 1979).

The warnings required under *Miranda v. Arizona,* 384 U.S. 436 (1966), are "an asolute prerequisite to interrogation." As pointed out in *Rhode Island v. Innis,*

446 U.S. 291 (1980):

> "The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Placing the furs in front of the cell clearly demonstrates an act of coercion by the detective to induce the respondent to waive his constitutional rights. These maneuvers are nothing short of the "functional equivalent" of illegal questioning which the Supreme Court interpreted as applicable to *Miranda (Supra,* p. 301).

Encircled in the functional equivalent of questioning are "any remarks, psychological tactics or patient maneuvering designed to elicit a response or to undermine the suspect's will to resist *People v. Faison,* 78 Ill App 3d 911, 913 (1979). In the instant case, there was an obvious violation of the respondent's rights and to allow such interplay of interrogation would "subjugate the individual to the will of his examiner" and thereby undermine the privilege; the privilege against compulsory self-incrimination (384 U.S. at 457). It is obvious these techniques of persuasion used by the police officers can not be permitted to undo the "safeguard" of the Fifth Amendment established in *Miranda.*

There are several cases that are illustrative of the functional equivalent of questioning and found the evidence inadmissible due to the fact that there had been no warnings. In *People v. Bodner,* (75 AD 2d 440) a detective confronted the defendant by talking of the

incapability of his cousin as the arsonist by checking and confirming his alibi. The court held this to be the same as telling the defendant he was guilty and lying. In addition, the disclosing of polygraph results to the suspect in *State v. Godfrey,* (131 N.J. Super 168) and a conversation regarding the death penalty as defendant's fate, (*State v. Emory,* 131 Ariz 493) are encompassed within the functional equivalence of questioning.

The state is not privileged to use psychological coercion to induce a defendant to make a statement *Leyra v. Denno,* 347 U.S. 566 (1954). Once an individual has exercised his rights to remain silent, all express questioning and its functional equivalent must cease (446 U.S. 291). Petitioners use of narrowing the holding of *Innis* is simply applying articulable fact in the place of established law. The functional equivalent of questioning to include psychological ploys has been overwhelmingly upheld. To hold that the placing of the furs in front of the cell was anything other than the functional equivalent of questioning would limit the scope of *Miranda* and "place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda.*" Henceforth, then, it is quite evident that the streamline of cases relied on by the People of the State of New York do not raise a constitutional question at all, but are simply attempting to take another "bite of the apple." This, in essence, would lead to a severe erosion of our fundamental rights and guarantees under the Fifth Amendment, and signal permission to the police to engage in a myriad of tactics in contridiction to the privileges protected and guaranteed by the Fifth Amendment of the Constitution.

POINT TWO

A FRESH SET OF MIRANDA WARNINGS MUST BE GIVEN WHEN QUESTIONING RESUMES ASSUMING, ARGUENDO, THAT ALL QUESTIONING MUST NOT PERMANENTLY CEASE ONCE THE RESPONDENT HAS EXERCISED HIS RIGHT TO COUNSEL.

"...All statements obtained after the person in custody has decided to remain silent depends on whether his right to cut off questioning was scrupulously honored.'" One may not, within a short period of time thereafter, continue his interrogation to overcome his silence without a fresh set of warnings, *Michigan v. Mosley,* 423 U.S. 96 (1979).

By placing the furs in front of respondent's cell as a psychological weapon to persuade respondent to waive his constitutional rights tainted the admission. The least to which respondent was entitled was a new set of Miranda Warnings in order to afford the respondent an opportunity to make a free willed intelligent waiver once Detective Cassi began interrogation. The fact that respondent was taken to an Italian Detective at his own request did not give the latter the privilege to interrogate without fresh Miranda Warnings. In the case at hand, the play of the police could never have produced an intelligent waiver.

A statement volunteered or spontaneously made will not be suppressible unless it is about the same crime and results from express questioning or the functional equivalent under circumstances which do not include fresh warnings and do not scrupulously

honor the suspects right to cut off questioning; *Rhode Island v. Innis*, 446 U.S. 290, 300-301, *Michigan v. Mosley, Supra, People v. Brant*, 59 N.Y. 2d 785). In the case at bar, respondent made no spontaneous declarations to the Detective, but responded to his questions only as a result of the police coercion.

Under the circumstances, respondent's statement was improperly induced and procurred and was correctly suppressed. Within the unequivocal law of *Mosley* the psyhological coercion used to overcome respondent's silence without a fresh set of warnings is plainly erroneous, and constitutionally malignant.

Conclusion

For the foregoing reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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